THE SHERMAN ACT

I

Problem of Construction

THE Sherman Act has given the federal government an opportunity to deal through its judicial department with contracts, combinations, and conspiracies in restraint of trade, monopolies, and attempts to monopolize.[1]

The first sentence of the act declares certain contracts, combinations, and conspiracies to be illegal generally. It reads:

"Every contract, combination in the form of a trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is hereby declared to be illegal."

Section 2, which speaks of monopoly or attempts to monopolize, merely declares that:

"Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several states, or with foreign nations, shall be deemed guilty of a misdemeanor."

There is no explicit provision that the acts of monopolizing or attempting to monopolize are generally illegal. Nevertheless, monopolies and attempts to monopolize are properly regarded as prohibited. Whether this is because monopolies or attempts to monopolize are really included in the prohibition of the first section, or because they are made illegal by the second section,

[1] Standard Oil Co. *v.* United States, 221 U. S. 1, 31 Sup. Ct. 502, [1089].* ("The debates show that doubt as to whether there was a common law of the United States which governed the subjects in the absence of the legislation was among the influences leading to the passage of the act.")

21 Cong. Rec. 3151–3152: "Mr. Kenna. If the Senator will permit me, I should like to ask him whether a monopoly such as he defines is prohibited at common law. I ask the Senator from Massachusetts whether a monopoly coming within the definition which he gives is prohibited at common law. Mr. Hoar. I so understand it. Mr. Kenna. Then why should this bill proceed to denounce that very monopoly? Mr. Hoar. Because there is not any common law of the United States."

* Figures in brackets refer to pages in Kales, Cases on Contracts and Combinations in Restraint of Trade.

is immaterial. Indeed, the United States Supreme Court in the Standard Oil Case suggests that the second section may include acts which were not covered by the first.[2]

The most important question regarding the construction of the Sherman Act is this: Does the prohibition of the act apply to *every* contract, combination, and conspiracy which is (however slightly) in restraint of trade, according to the literal significance of those words; or does it apply only to every *illegal* contract, combination, or conspiracy in restraint of trade — the determination of what contracts, combinations, and conspiracies are illegal because in restraint of trade being left to a standard outside of the act? In short, does the act by its terms prohibit any specified conduct, or does it simply induct the federal courts into a new federal jurisdiction there to operate and obtain results based on some standard outside the terms of the act?

There are three ways of describing this outside standard: It may be called the standard of the common law. It may be described as the fiat of the court itself, based upon its collective judgment and reason. It may be referred to as an authority to obtain results just as a common-law court reached them, *i. e.*, by the exercise of a certain technique of judicial reasoning, which includes a consideration of the conclusions which other common-law courts have reached, while at the same time exercising the power to examine the basis for the results which other courts have obtained and possibly reaching a different conclusion. Characterizing the standard as that of the common law really is not different from describing it in the other two ways, because the Supreme Court of the United States must always remain the final judge of what the common law which it adopts may be. That introduces into the standard the fiat of the court or the technique of judicial reasoning used by common-law courts. Referring to the standard as the fiat of the court is not different in fact from describing it

[2] Standard Oil Co. *v.* United States, 221 U. S. 1, 31 Sup. Ct. 502, [1098]. ("In other words, having by the first section forbidden all means of monopolizing trade, that is, unduly restraining it by means of every contract, combination, etc., the second section seeks, if possible, to make the prohibitions of the act all the more complete and perfect by embracing all attempts to reach the end prohibited by the first section, that is, restraints of trade, by any attempt to monopolize, or monopolization thereof, even though the act by which such results are attempted to be brought about or are brought about be not embraced within the general enumeration of the first section.")

as based upon a certain technique of judicial reasoning. It is objectionable because it suggests arbitrary action by the court instead of action based upon a recognized judicial process of reasoning. The three methods of describing the standard outside the act, therefore, really come to the same thing; but the third method is the most complete and the fairest way to describe the standard referred to. We may call it for the sake of brevity "the standard of reason which had been applied at common law."

Our principal question of construction of the Sherman Act then is: Does the act by its terms prohibit any specified conduct, or does it simply induct the federal courts into a new federal jurisdiction there to operate and obtain results in accordance with "the standard of reason which had been applied at common law"? The latter view has now been accepted, but not before the court seemed to have committed itself to the former. The decisions of the United States Supreme Court will therefore be examined with a view to showing that the results reached are consistent with the application of the standard of the common law and the standard of reason which had been applied at common law, and inconsistent, in some instances, at least, with the view that the Sherman Act on its face specified the conduct prohibited without reference to any standard outside the act. Then the *dicta* of the court will be examined to show how the court, after first taking the view that the act specified the conduct prohibited without reference to any outside standard, abandoned that position and adopted the view that the conduct prohibited was to be determined in accordance with the "standard of reason which had been applied at common law."

The principal difficulty in applying the Sherman Act is, therefore, not strictly one of construing its terms, but in determining what acts in restraint of trade and in the furtherance of monopoly are illegal according to "the standard of reason which had been applied at common law." How shall the judicial discretion which the act vests in the court to declare some contracts, combinations, and conspiracies in restraint of trade to be legal and others illegal be exercised? The uncertainty which arises from the operation of such a judicial function is no greater than that which attends any new course of decision by common-law courts.[3]

[3] It is, of course, arguable that the results reached by the court, while arrived at slowly and piecemeal, and with considerable expense to the individuals who litigate,

II

THE DECISIONS OF THE UNITED STATES SUPREME COURT UNDER THE SHERMAN ACT

(*a*) *Contracts Accompanying the Sale of a Business*

Cincinnati Packet Co. v. *Bay*[4] presents the question of the validity of a restrictive covenant accompanying the sale of a business. The covenant is limited in time and not broader than the scope of the seller's business. It is just the sort that would have been valid at common law. It was held valid under the Sherman Act.[5] If the Sherman Act prohibited all contracts which restrained trade, however slightly, surely this would have been one of those that would be void.

In *Shawnee Compress Co.* v. *Anderson*[6] we have a plain case, so far as the record in the Supreme Court of the United States is concerned, of many leases with restrictive covenants, all secured for the purpose of creating a combination and with the intent to monopolize the business. At common law this would have been an illegal attempt at monopoly. It was held illegal under the Sherman Act.

(*b*) *Exclusive Contracts of Sale and Purchase*

Continental Wall Paper Co. v. *Voight*[7] is of little value so far as the application of the Sherman Act is concerned. The case arose on demurrer to a defense which set out a combination of ninety-eight per cent of the manufacturers of wall paper which entered into exclusive contracts with jobbers and retailers all over the United States. This made in fact a combination between the manufacturers, jobbers, and retailers, with the intent to monopolize and

are better and will last longer than if Congress had attempted *a priori* to prohibit certain definite acts, or to break up any clearly defined status.

[4] 200 U. S. 179, 26 Sup. Ct. 208.

[5] United States *v.* Trans-Missouri Freight Association, 166 U. S. 290, 17 Sup. Ct. 540, [878]. ("A contract which is a mere accompaniment of the sale of property, and thus entered into for the purpose of enhancing the price at which the vendor sells it, which, in effect, is collateral to such sale; and where the main purpose of the whole contract is accomplished by such sale, might not be included within the letter or spirit of the statute in question.")

[6] 209 U. S. 423, 28 Sup. Ct, 572.

[7] 212 U. S. 227, 29 Sup. Ct. 280.

exclude from the business everybody else. The case is so plainly one of an attempt to monopolize which would have been illegal at common law that the court spends only a few lines in stating in substance that it assumes the illegality of the combination.

(c) *Contracts to Keep up the Price on Resale*

Dr. Miles Medical Co. v. *Park & Sons Co.*[8] might appear to be a case where the Supreme Court had held contracts, or a combination to be in violation of the Sherman Act, which would not have been invalid at common law.[9] It might be used, therefore, to indicate that the Sherman Act was broader than the common law. But this is not so. The Supreme Court of the United States is the sole judge of what is the common law which it recognizes as the standard to be used in applying the Sherman Act. It may have determined, as it had a right to do, what it considered to be the common law applicable, and that this common law required the result reached in the Dr. Miles Case.

In the same way, if the Supreme Court of the United States should in operating under the Sherman Act hold that a contract by the purchaser of a mule not to use any currycombs on it except those furnished by the seller was illegal; that a contract by the purchaser of a picture not to use any cleaning or preservative material upon it except that furnished by the seller was illegal; and that similarly a contract by the purchaser or licensee of a patented article that he would use with it only unpatented accessories sold by the seller or licensor was illegal, we should not have a decision that the Sherman Act is broader than the common law, but merely that the United States Supreme Court is the final judge of what the common law, which it purports to follow, may be.

---

[8] 220 U. S. 373, 31 Sup. Ct. 376, [838].

[9] Elliman, Sons, & Co. *v.* Carrington & Son, [1901] 2 Ch. 275; Grogan *v.* Chaffee, 156 Cal. 611, 105 P. 745; Garst *v.* Charles, 187 Mass. 144, 72 N. E. 839; Garst *v.* Harris, 177 Mass. 72, 58 N. E. 174; Clark *v.* Frank, 17 Mo. App. 602; New York Ice Co. *v.* Parker, 21 How. Pr. 302.

(*d*) *Combinations*

COMBINATIONS OF TRANSPORTATION UNITS

The basis for the decisions in the Trans-Missouri Freight Association Case [10] and the Joint Traffic Association Case [11] is clear. The railroads operated under special franchises. The public was excluded from the business in general. If two were let into the business, the public policy was made plain that they should compete, and as all the rest of the public was excluded, the two had a monopoly except for the competition between themselves. When, therefore, they united, they not only violated the declared public policy in favor of competition, but they achieved an actual monopoly. All combinations of public utilities, which can operate only under special franchises so that the public generally is excluded from the business, are therefore illegal *per se* at common law. Hence, such combinations are illegal *per se* under the Sherman Act where interstate or foreign commerce is involved. So far, therefore, as railroads are concerned, the proposition is literally true, that under the Sherman Act every restraint of trade by combination and every attempt to monopolize by combination is illegal. This, however, is not because of any language of the Sherman Act, but because of the standard of the common law or the standard of the rule of reason which the Sherman Act adopts.

This ground for the decision in the Trans-Missouri Freight Association Case appears rather vaguely in the opinion of the court. If the case had been put squarely and solely upon this ground much subsequent difficulty would have been avoided.

The Northern Securities Case [12] is to be supported on the same basis as the Trans-Missouri Freight Association and Joint Traffic Association cases. The actual decision is therefore confined to the cases where public utilities which must have special franchises under which to operate are combined. In this view it would make no difference whether the combination were by a holding corporation or an individual. The suggestion of Mr. Justice Brewer and of Mr. Justice Holmes that an individual could have bought up the stock control of both roads cannot be sustained.

[10] 166 U. S. 290, 17 Sup. Ct. 540.
[11] 171 U. S. 505, 19 Sup. Ct. 25.
[12] 193 U. S. 197, 24 Sup. Ct. 436.

The opinion of the majority contains no suggestion, however, of the proper basis for the result. It serves up cases of combinations of coal companies, trading and manufacturing companies, as if the court were entitled to treat combinations of railway corporations operating under special franchises in exactly the same way as it was combinations of trading and manufacturing corporations. Furthermore, much language in the opinion will justify the inference that the court was not only making no distinction between combinations of public utilities using special franchises, and trading and manufacturing units, but was asserting that no combination which eliminated competition between the units would be legal. It was this apparent position on the part of the court that raised the storm of protest against the Northern Securities Case. Even Mr. Gray [13] insisted that the court had in fact held that the elimination of competition between any units engaged in interstate commerce would be illegal.[14]

All the difficulties with the Northern Securities Case, and all the grounds for objection to it, are immediately eliminated when it is observed that the essential feature of the case was that the railroads combined were operating under special franchises which gave the competing roads together a monopoly as against the rest of the public, and also indicated a public policy that the railroads which had the special franchises to go into the railroad business should compete. It is not to be expected that Mr. Gray would disagree with the result of the Northern Securities Case based upon this fact. Without this element the case put by Mr. Gray concerning the three Jerseymen certainly presented no violation of the Sherman Act, and such a conclusion would not be at all inconsistent with the result reached in the Northern Securities Case.[15]

---

[13] John C. Gray, "The Merger Case," 17 HARV. L. REV. 474.

[14] Mr. Gray put the following as containing all the essential elements of the Northern Securities Case with the dramatic elements left out and picturesque ones substituted: "Three Jerseymen, whom we will call Morgan, Hill, and Lamont, own each a cart and one horse. Their occupation is the carrying of eggs and chickens from the neighboring farmers to a market town over the New York border. They agree to form a corporation under the name of the Interstate Poultry Traffic Association. The only capital they turn in consists of their horses and carts, except a few dollars contributed to pay for their charter. Are they criminals liable to be fined $5,000 apiece and imprisoned for a year?"

[15] The majority regarded the formation of the Northern Securities Company and its acquisition of stock as affecting interstate commerce so that it might be brought

The Union Pacific Case [16] follows the Trans-Missouri Freight Association and Joint Traffic Association cases and the Northern Securities Case. It holds that the mere union of competing railroad corporations is illegal.

The court emphasizes the application of the rule to railroads, but why a difference should be made between railroads and trading and manufacturing units is not in the least hinted at. It is submitted that the fact that the railroads can be operated only under special franchises, and that the public generally is thus excluded from the business, furnishes the true basis for the difference.

The competition between the Union Pacific and the Southern was very much less conspicuous than the competition between the Union Pacific and the Northern Pacific. The Union Pacific ran from Omaha to Ogden and from Ogden to San Francisco over the Southern Pacific's own line. It also ran from Ogden to Portland. From Portland to San Francisco it operated by steamer. The Southern Pacific ran from New Orleans to San Francisco *via* Los Angeles. The court assumed that a line shipping from New Orleans in the Mississippi Valley competed with a line shipping from Omaha, that is to say, shipments to the Pacific from a large area east and west of the Mississippi might go as conveniently *via* New Orleans as *via* Omaha. Hence, though these terminals were 1,000 miles apart or more, they were competitive. Then the Supreme Court found the principal competition at the other end of the line to be between the Southern Pacific to San Francisco and the Union Pacific to San Francisco *via* the Union Pacific's own line to Portland, and then by water to San Francisco.

It has been suggested that as a matter of fact both lines were competitive to San Francisco direct by rail, because the connection between the Union Pacific and the Southern Pacific to San Francisco would be compelled by the Interstate Commerce Commission. It has been suggested also that both lines were competitive so far as foreign trade was concerned, because each reached the Pacific coast from the Mississippi Valley, and it was immaterial

within the Sherman Act. Four judges dissented on this proposition. No comment is made on this phase of the case. Whether the interstate commerce act excluded the railroads from the Sherman Act was a question fully argued and determined in the Trans-Missouri Freight Association and Joint Traffic Association cases.

[16] 226 U. S. 61, 470, 33 Sup. Ct. 53, 162.

for the purposes of foreign commerce whether they reached the same port or not.

The court in the Standard Oil Case [17] affirms the soundness of the result reached in the Joint Traffic Association cases.[18] It refers to "the nature and character of the contract creating . . . a conclusive presumption which brought them within the statute." This leaves much to be desired in the way of explaining why there should be a "conclusive presumption" making a combination of railroads illegal, while when manufacturing and trading corporations combined or occupied a preponderant position in the market, there was only a *prima facie* presumption which would bring them within the prohibition of the act. It is submitted that the explanation already offered indicates the difference.

In *United States* v. *Terminal Railroad Association of St. Louis* [19] it was held that a combination of all the railroad terminal facilities of St. Louis under the control of less than all the companies under compulsion to use them was illegal. At the same time the court insisted that the combination of all such facilities under the control of all the companies under compulsion to use them, and open to the use of all on equal terms, would be legal. Such a combination it was declared could only further competition and commerce. It could not restrain or suppress either. Hence the court ordered a decree of dissolution, unless the defendant underwent a reorganization, as outlined by the court, which would make it a combination of all the terminal facilities, subject to the control of all the railroads under compulsion to use them and without discrimination against any.

In *United States* v. *Reading Company* [20] the court held illegal, in accordance with the principle of the Northern Securities Case, a combination of competing railroads. The court also held the combination to be illegal under the principle established by the Standard Oil Case, because it was a combination of anthracite coal companies in a limited anthracite coal field together with the railroads serving the mines, which occupied a preponderant position in the anthracite coal business and had the actual intent and pur-

[17] Standard Oil Co. *v.* United States, 221 U. S. 1, 21 Sup. Ct. 502.

[18] [1102.]

[19] 224 U. S. 383, 32 Sup. Ct. 507.

[20] 226 U. S. 324, 33 Sup. Ct. 90.

pose to exclude others from the business, or suppress their competition, and thereby secure a monopoly. The facts which proved this were intricate and voluminous. The principle applied is clear.

OF TRADING AND MANUFACTURING UNITS

The case of *Addyston Pipe & Steel Co.* v. *United States*[21] has already been fully dealt with.[22] The opinion in the United States Supreme Court makes the case one where the preponderant position in the business, as a result of combination by contract, caused the combination to be illegal. Whether this was because size and preponderant position by combination were *per se* illegal, or whether there was an unrebutted *prima facie* inference of illegality, does not appear.

In *Swift & Company* v. *United States*[23] the decree attacked was entered upon demurrer to the bill, and the bill made a very plain case of excluding purposes and preponderant position on the part of the defendants. The preponderant position is set out. The defendants had control of about six-tenths of the entire trade. The illegal practices are set out. There was a secret arrangement on the part of the units in the combination not to bid against each other. There were also rebates and an assumption of control[24] of the market by fixing prices.

In *United States* v. *Kissel*[25] the only question was the sufficiency of a plea of the Statute of Limitations. It was sufficient if the acts constituting the offense were continuing. It was held that the acts were continuing. The case is of some value as making clear that in cases of illegal combinations, restraints of trade, and attempts to monopolize, the combinations created not only may, but usually are, continuing wrongs. The court apparently had nothing to do with whether the particular scheme in question practiced was an unlawful or unfair method of competition or not.

In *Standard Oil Co.* v. *United States*[26] we have a case where a

[21] 175 U. S. 211, 20 Sup. Ct. 96, [1047].
[22] A. M. Kales, "Good and Bad Trusts," 30 HARV. L. REV. 847.
[23] 196 U. S. 375, 25 Sup. Ct. 276, [1056].
[24] A. M. Kales, "Good and Bad Trusts," 30 HARV. L. REV. 852.
[25] 218 U. S. 601, 31 Sup. Ct. 124.
[26] 221 U. S. 1, 31 Sup. Ct. 502.

manufacturing and trading unit carrying on a business which was normally free to all, occupying a preponderant position in that business, had the purpose to use its power to exclude others, and did in fact do so by illegal and unfair methods of competition. This case together with the Tobacco Case [27] stands for the proposition that where these elements are presented the unit in question is an illegal attempt to monopolize and an illegal restraint of trade.

That the business in question was normally free to all to engage in appears from the fact that it was a manufacturing and trading business — the manufacturing of refined oil and its sale and distribution. It was not a business depending upon special franchises.[28]

As to the size of the unit: The evidence clearly showed that the Standard Oil Company of New Jersey held a preponderant position in the manufacturing and distribution of oil. There is a difficulty, however, in finding any passage in the opinion which describes the percentage of the total business which the Standard Oil Company did.

It may be assumed that there was ample evidence of illegal and unfair methods of competition, particularly in the early stages of the Standard Oil Company. Curiously enough, however, the opinion of the court is very weak in setting forth any such methods. The passages which purport to deal with them contain many words which give an impression of weight by their sound; but a careful attention to what is said must leave the reader in doubt as to whether any of the suggested methods were illegal or unfair methods of competition. One is impressed by the fact that in various forms the Chief Justice has simply reiterated the fact that the Standard Oil Company was large and successful. What he says boils down to size and success.

The whole case against the Standard Oil Company as made in the opinion of the court seems to rest upon the defendant's attempt to monopolize by excluding others from the business. It is noticeable, however, that while the court talks about the intent to monop-

[27] United States *v.* American Tobacco Co., 221 U. S. 106, 31 Sup. Ct. 632.

[28] It has been suggested that as there were included in the Standard Oil Company many pipe lines operated under special franchises, the rule applicable in the Northern Securities Case might also have been invoked. But the opinion of the court does not suggest any such basis for its decision, and hence this aspect of the case is ignored.

olize, it does not specify that that intent is to be carried out by the use of illegal and unfair methods of competition. Yet that must be the assumption. An intent to succeed in business over rivals by the achievement of greater efficiency is not a crime or illegal at common law. The intent to monopolize in the opinion of the court arises only as a *prima facie* inference from size. The Chief Justice has used a great many and some very long sentences, but every time they are read carefully it will be found that all he has said is, that the Standard Oil Company was an organization of monstrously large size, and from this size, constantly referred to in various ways, the intent to monopolize is discovered. Nevertheless, it is said constantly that the intent to monopolize arises from size only as a *prima facie* inference or presumption.

The character of the organization of the Standard Oil Company of New Jersey with respect to whether it was a combination of competing units, or even, properly speaking, a combination at all, requires attention.

The Standard Oil Company of New Jersey as reorganized in 1899 was the precise point of attack by the government. It was that organization which was dissolved by the decree. Of course, the decree did not permit the older organizations to step into the place of the Standard Oil Company of New Jersey, but required a dissolution which created new operating units.

The Standard Oil Company of New Jersey as organized in 1899 was plainly not a combination of competing units. True, they may have competed years ago and before the Sherman Act, but when the Sherman Act was passed in 1890 they were all, or substantially all, already combined in the Standard Oil Trust and had ceased to compete, and the combination was legal so far as the federal law was concerned. It follows, therefore, that the Standard Oil Company of New Jersey was a combination of non-competing units which never had competed since the Sherman Act was passed. The elimination of competition between the units combined before the Sherman Act could not be urged as a ground of illegality under the Sherman Act. The legality or illegality of the Standard Oil Company of New Jersey must have been determined with reference to a *single combination of non-competing units.*

One may even doubt whether the Standard Oil Company of New Jersey was properly speaking a combination at all. When

the Standard Oil Trust was formed in 1882 it was perfectly legal so far as the federal law was concerned. It represented an effort at organization in larger units than formerly, in accordance with the demands of the industrial revolution which was in progress. If then it was not illegal — and it was not so far as the federal law was concerned since there was no Sherman Act — surely it must be regarded as a normal and proper method of creating a unit in the industrial world. Hence at the time of the Sherman Act the Standard Oil Trust was a normal, legal, and proper industrial unit. Only in a very popular sense was it still a combination. In dealing with it under the Sherman Act the court was simply bringing within its jurisdiction an industrial unit which was in existence and with respect to the legality of the original organization of which there could be no question.

The Standard Oil Case, therefore, seems actually to hold that a unit, which started as entirely legal and which grew as its business succeeded until it held a preponderant position in the business, but which all the time had the intent to monopolize, would be illegal when it came to occupy the preponderant position. In short, it appears actually to hold that any unit, however formed, which secures a preponderant position by means however legal and proper, and which then acquires the intent to monopolize, becomes illegal. You do not need combination. You do not need a unit which is organized in a particular way. You do not even need the elimination of competition between the units. You do not need abnormal growth, so called. What you do need is merely a preponderant position in the business coupled with an intent to monopolize.

If A., for instance, as an individual, manufactured low-priced automobiles and had, by a process of the extraordinary growth of business, secured a preponderant position in the manufacture and sale of such cars, and if he should then as an individual start to use his power to exclude others by illegal and unfair methods of competition, or if there could be brought home to him the intent to monopolize by any other means, he would be carrying on business in violation of the Sherman Act. One does not quite see how equity could dissolve him, but indictment and injunction against the committing of acts would probably be ample remedies. Would a court of equity undertake to limit the size of his business and its output so as to reduce it to a unit not occupying a preponderant position?

Could it split up his business and require parts of it to be sold? There are difficulties here, but the main proposition that the individual could violate the Sherman Act is sound.

In *United States* v. *Pacific and Arctic Railway and Navigation Company* [29] the first and second counts of the indictment were sustained. They charged a combination between a steamship company, a wharves company, and a railroad, which together occupied a preponderant position in the transportation service from ports in the United States to places in Alaska. This combination had the actual purpose to exclude others from this transportation service and to secure a monopoly, and attempted to carry out this purpose by unfair methods of competition. The carriers were connected and not competing, and there was, therefore, no application of the principle of the Northern Securities Case;[30] but the combination used its combined powers to exclude all other companies serving any part of the route in question. The railroad fixed local rates higher than the railroad's *pro rata* of the through rate which it made to members of the combination. The railroad then refused any through rate to steamship lines outside the combination. The wharves company charged more for freight if shipped by a line outside of the combination than it did for freight shipped on a line in the combination, and the wharves company had a monopoly of the wharfing facilities at the connecting port. The facts set up in the indictment clearly brought the case within the principle of the Standard Oil and Tobacco cases.[31]

(e) *Competitive Methods*

In *Anderson* v. *United States* [32] a rule of the Trader's Live Stock Exchange of Kansas City which provided that its members should not deal with any other yard trader, unless he was a member of such exchange, was sustained. Clearly the Trader's Exchange was competing with outside traders. It was trying to gain something by concerted action in refusing to deal with them. It seems to have been assumed that the exchange was not attempting primarily to force the outside traders out of business so as to secure the entire business for the members of the exchange, but was merely trying to hamper the outside traders sufficiently to bring them into the ex-

[29] 228 U. S. 87, 33 Sup. Ct. 443.
[30] *Supra*, note 12.
[31] *Supra*, notes 26 and 27.
[32] 171 U. S. 604, 19 Sup. Ct. 50.

change, where they would be subjected to standards of conduct which were assumed to be highly desirable.

In *Montague* v. *Lowry*[33] we have an exclusive arrangement between the tile dealers of San Francisco and the manufacturers. The manufacturers were to sell only to those tile dealers in San Francisco and to no others. The plaintiffs were independent tile dealers in San Francisco who were injured because they could not buy from the manufacturers who were in the association. The plaintiffs had a verdict of $500 and a judgment under the Sherman Act for $1,500. This was affirmed.

This case is subject to the comment that it does not appear clearly how large the combination of manufacturers was. Did it occupy a preponderant position in the tile-manufacturing business? Probably it did. Very likely the evidence disclosed the fact, but as it is a fact of the very utmost importance, it is strange that the opinion of the court lays no emphasis upon it.[34] If such an arrangement as this had been made with three manufacturers out of fifty, it would have been entirely unobjectionable. The plaintiffs would then have had ample opportunity to secure all the tile they wanted. It is only when the combination occupies a preponderant position and begins to connect up with collective units of dealers having also a preponderant position in the local situation, that the *prima facie* inference of intent to use the power of the combination to exclude others by unlawful and unfair methods of competition arises, and the damage to the plaintiff caused by the exclusive contracts becomes a tort according to the common law.

In *Eastern States Retail Lumber Dealers' Association* v. *United States*[35] the government obtained an injunction restraining an association of retail lumber dealers from circulating among its members lists of wholesalers who were attempting to sell directly to consumers.[36] It was conceded that the circulation of these lists was for the purpose of systematically causing the retailers not to

---

[33] 193 U. S. 38, 24 Sup. Ct. 307.

[34] Is this because Mr. Justice Peckham who wrote the opinion of the court was still under the influence of his *dicta* in the Trans-Missouri Freight Association and Joint Traffic Association cases and therefore was declining to make size an element of illegality?

[35] 234 U. S. 600, 34 Sup. Ct. 951, [1157].

[36] It would seem that this was the only relief obtained. See United States *v.* Eastern States Retail Lumber Dealers' Ass'n, 201 Fed. 581.

deal with such wholesalers. What objection was there to this? Two groups of lumber dealers were in competition — the wholesalers and the retailers. Both were competing for the trade of the consumer. The wholesalers were really trying to break into the retail trade. It is of course in the public interest that they should compete. Very well, how may this competition be carried on? Is competition in price the only method of competition which the courts will permit? Certainly not. It happened that the retailers bought from the wholesalers. May not the retailers then cease buying from the wholesalers for the purpose of defeating them in this competitive struggle? Would not such an act be exactly the same as the act of striking by employees to compel their employer to refuse to recognize a rival group of employees working for the same employer, and by this means enable the strikers to triumph in their competitive struggle with the rival group of workers? If the employer started to work on his own job with his workmen and they struck to prevent him, the situation would be precisely the same as the action by the Retail Lumber Dealers. Such acts of striking, whether by employees against an employer,[37] or a Retail Dealers' Association against the wholesalers,[38] are not by themselves illegal. Such acts have been regularly held to be legitimate methods of competition. They do not become illegal simply because they succeed in defeating the rival. Why? Because the public interest is, on the whole, better served by permitting this freedom of action to compete and the triumph of some competitors over others, than it is by calling the strike in and of itself an unfair method of competition and illegal and tortious, and by this means maintaining the *status quo* of existing competition.

The situation is altered as soon as one can say that the strikers or the blacklisters have a preponderant position in the field and in consequence a power which makes it impossible for any rival to retaliate by the use of the same competitive methods.[39] Size *ipso facto* deprives the preponderant unit of the right to use methods of competition which, in the hands of smaller units, are legal. The result in the Lumber Dealers' Association case is to be supported

[37] Allen *v.* Flood, [1898] A. C. 1.

[38] Bohn Mfg. Co. *v.* Hollis, 54 Minn. 223, 55 N. W. 1119.

[39] Martell *v.* White, 185 Mass. 255, 69 N. E. 1085; Macauley *v.* Tierney, 19 R. I. 255, 33 Atl. 1.

on the ground that the retailers had sufficient size and preponderant position in the retail business so that they were deprived of a method of competition which was in and of itself lawful.

There are, however, two difficulties with the opinion of the court: First, the case as reported does not disclose any facts clearly indicating the size and preponderant position of the retailers in any market. One may guess from statements made that they constituted a large and powerful organization, but if this fact be left to guesswork, one may also hazard the surmise that the wholesalers would have been quite as powerful and perhaps more so if they had been organized, and that the wholesalers were therefore, potentially at least, quite able to retaliate by refusing to sell to any retailer who belonged to an association which blacklisted any member of the Wholesalers' Association. If such was the case it was not the business of the courts to say that the success of one competitor over another by the use of its power to refuse to deal with the other became a tort by the mere fact of success, or because it was used for the purpose of successful competition in securing business. Secondly, it is not at all clear that the court concedes the right of any combination of retail lumber dealers, however insignificant in size, to act in concert in refusing to deal with wholesalers who sell to consumers direct. The opinion while conceding that any one retail lumber dealer may refuse to deal with a wholesaler for any reason he pleases intimates that two or more could not do so.[40] This sounds like the proposition that a single workman may strike for any reason he pleases, but that if two or more do it in concert it is an unlawful conspiracy. It is difficult to believe that a court, unhampered by any statute or previous decision dealing directly with the point and reaching the problem today for the first time with full power to

[40] "A retail dealer has the unquestioned right to stop dealing with a wholesaler for reasons sufficient to himself, and may do so because he thinks such dealer is acting unfairly in trying to undermine his trade. 'But,' as was said by Mr. Justice Lurton, speaking for the court in Grenada Lumber Co. *v.* Mississippi, 217 U. S. 433, 30 Sup. Ct. 535, 'when the plaintiffs in error combine and agree that no one of them will trade with any producer or wholesaler who shall sell to a consumer within the trade range of any of them, quite another case is presented. An act harmless when done by one may become a public wrong when done by many acting in concert, for it then takes on the form of a conspiracy, and may be prohibited or punished, if the result be hurtful to the public or to the individual against whom the concerted action is directed.'"

solve it by the application of the rule of reason, could seriously put forward any such proposition.

Even, however, if the Supreme Court's decision in the Lumber Dealers' Association case be regarded as inconsistent with the results reached by common-law courts, that does not mean that the Sherman Act specifies as illegal conduct which at common law was legal. It only means that the Supreme Court, in the exercise of its function as a common-law court, reaching results as common-law courts are accustomed to do, obtained a different result from some other common-law court; or that it exercised its prerogative to determine for itself what the common law was.

In *Loewe* v. *Lawlor* [41] the secondary boycott by the hatters' union was held to be illegal because in violation of the Sherman Act, and the employer recovered triple damages. The union members boycotted dealers throughout the country who handled the plaintiffs' hats. This was done for the purpose of inducing such dealers not to handle the plaintiffs' hats. The plaintiffs were damaged, and pressure was thus brought to bear upon them to compel them to unionize their shop and thus aid the National Hatters' Union in its competitive struggle with non-union labor. The preponderant position of the hatters' union in the United States was brought out by the number of employees in the union and by the fact that seventy out of eighty-two manufacturers in the hat business had acceded to the demands of the union to exclude non-union labor. In accordance with the common law, the secondary boycott by itself was a tort [42] and might be expected to be held illegal under the Sherman Act; but the additional facts showing a preponderant position in the business of the boycotting hatters was sufficient to have made some acts torts which otherwise might have been lawful though rather strenuous methods of competition.

In *Thomsen* v. *Cayser* [43] a judgment for triple damages secured by a shipper against a combination of steamship lines which established a uniform freight rate and made a rebate to those shippers dealing exclusively with the combination was sustained.

---

[41] 208 U. S. 274, 28 Sup. Ct. 301, [1166]; also Lawlor *v.* Loewe, 235 U. S. 522, 35 Sup. Ct. 170.

[42] Quinn *v.* Leathem, [1901] A. C. 495.

[43] 243 U. S. 66, 37 Sup. Ct. 353.

In the opinion of the court it was intimated that the combination employed

"'fighting ships' to kill off competing vessels which, tempted by the profits of the trade, used the free and unfixed courses of the seas, to paraphrase the language of counsel, to break in upon defendants' monopoly."

Here we have the same methods of competition which were found not to constitute a tort in *Mogul Steamship Co.* v. *McGregor, Gow & Co.*[44] Again we must ask whether these methods are *per se* illegal under the Sherman Act, regardless of the size and preponderant position of the combination, or does the court assume the existence of such size and preponderant position from its effectiveness or from any other evidence?

III

The Dicta of the United States Supreme Court

So far as the actual decisions of the United States Supreme Court are concerned, they are consistent with the view that not *every* contract, combination, or conspiracy which is (however slightly) in restraint of trade according to the literal significance of those words, is illegal. The decisions of the court are equally consistent with the view that the act condemns only contracts, combinations, and conspiracies in restraint of trade which are deemed illegal according to some standard which is outside the language of the act — either the standard of the common law or the standard of the rule of reason.

But when we look at the *dicta* of the court we find that originally there was much uncertainty in the choice to be made between the possible views.

In *United States* v. *Trans-Missouri Freight Association*[45] the court, speaking by Mr. Justice Peckham, said: "the contract may be a restraint of trade, but still be valid at common law." The court thus intimated that the Sherman Act might hit restraints of trade which were valid at common law.[46] There was no call for this state-

[44] [1892] A. C. 25, [309].

[45] 166 U. S. 290, 17 Sup. Ct. 540.

[46] "A contract may be in restraint of trade, and still be valid at common law. Although valid, it is nevertheless a contract in restraint of trade, and would be so

ment, and it has given rise to a great deal of unnecessary discussion. For instance, the majority of the court having talked in the unnecessary way just noted, the dissenting justices poured forth pages of dissenting opinion combating this *dictum*. The result was that the majority were right in their decision, but wrong in this *dictum*. The dissent is right in criticizing the *dictum*. The result is apparent disagreement as to the proper decision to be reached when, as a matter of fact, there is only disagreement as to an unnecessary statement of opinion.

In the Northern Securities Case [47] four judges out of nine failed to state in their opinion the true ground for the decision,[48] and appeared to place the result reached by them on the ground that any merger of competing units, however insignificant, was illegal.[49] Four judges, therefore, seemed to support the view that the Sherman Act went far beyond the common law in holding acts illegal because in restraint of trade. Mr. Justice Brewer, while supporting the result reached by the court and furnishing in fact the decisive vote in favor of that result, repudiated the unnecessary language and *dictum* of the Trans-Missouri Freight Association Case, and asserted that the restraint to be illegal must be unreasonable. Mr. Justice Peckham agreed with Mr. Justice Holmes that the Northern Securities Company did not violate the Sherman Act; and it therefore became necessary for him to distinguish the actual decision in the Trans-Missouri Freight Association Case, in which he wrote the opinion of the court. This he permits Mr. Justice Holmes to do for him. Mr. Justice Holmes attempts to draw a distinction between combination by contract and combination by merger. In the Traffic Association cases the railroads stayed in the business

---

described either at common law or elsewhere. By the simple use of the term 'contract in restraint of trade,' all contracts of that nature, whether valid or otherwise, would be included, and not alone that kind of contract which was invalid and unenforceable as being in unreasonable restraint of trade. When, therefore, the body of an act pronounces as illegal every contract or combination in restraint of trade or commerce among the several states, etc., the plain and ordinary meaning of such language is not limited to that kind of contract alone which is in unreasonable restraint of trade, but all contracts are included in such language, and no exception or limitation can be added without placing in the act that which has been omitted by Congress."

[47] 193 U. S. 197, 24 Sup. Ct. 436.

[48] *Supra*, note 47.

[49] John C. Gray evidently so regarded the opinion: "The Merger Case," 17 HARV. L. REV. 474, *supra*, note 15.

and continued to operate their respective properties. There was still competition in service. By agreement they eliminated competition as to rates. In the Northern Securities Case they combined by merger and the placing of competing properties in the hands of a single new operating unit. This eliminated competition both as to rates and service. The elimination of competition was quite as effective, if not more so, than that which occurred by contract in the Traffic Association cases. It now seems impossible to condemn a combination by contract, such as was dealt with in the Traffic Association cases, and at the same time sustain a combination by merger such as occurred in the Northern Securities Case.

It was entirely unnecessary for the decision in the Standard Oil Case [50] that the court should attempt to say whether the Sherman Act prohibited every contract, combination, or conspiracy which was (however slightly) in restraint of trade, according to the literal meaning of that phrase, or whether it prohibited only illegal contracts, combinations, and conspiracies in restraint of trade — the illegality being determined by some standard outside the act, such as the standard of the common law or the standard of the rule of reason. On either theory the Standard Oil Company of New Jersey was illegal. Nevertheless, eight judges out of nine undertook in a solemn *dictum* to settle the matter in favor of the latter view.

The court, in generalizing as to what was prohibited by the Sherman Act, referred to:

"All contracts or acts which were *unreasonably* restrictive of competitive conditions, either from the nature or character of the contract or act, or where the surrounding circumstances were such as to justify the conclusion that they had not been entered into or performed with the legitimate purpose of *reasonably* forwarding personal interest and developing trade, but, on the contrary, were of such a character as to give rise to the inference or presumption that they had been entered into or done with the *intent to do wrong* to the general public and to limit the *right* of individuals, *thus* restraining the free flow of commerce and tending to bring about the evils, such as enhancement of prices, which were considered to be against public policy."

Such a characterization is of course absolutely silent as to what specific acts are illegal. As to that matter the phrases used are all quite circular and self-proving. A reference to acts which are "un-

[50] Standard Oil Company *v.* United States, 221 U. S. 1, 31 Sup. Ct. 502.

reasonably restrictive of competitive conditions" still leaves undone the process of balancing interests in order to determine what features of a given situation are distinctive, and whether the balance is in favor of or against the validity of the acts in question. So where the court, in attempting further to specify what is a test of unreasonableness, says that the act would be illegal if "done with the *intent to do wrong* to the general public and *to limit the right* of individuals," it leaves us quite as much in the dark as before as to what is a "wrong" to the general public and what is "the right" of individuals. What the passage does clearly say is that the Sherman Act is not to be looked to for the purpose of determining what specific acts are prohibited; that the function of the act is merely to conduct the court into a given federal jurisdictional subject, and there leave it to secure results according to some standard outside the terms of the act itself.

Then the court undertakes to define what this standard is. It says:

". . . the provision [of section 1 of the Sherman Act] necessarily called for the exercise of judgment which required that some standard should be resorted to for the purpose of determining whether the prohibition contained in the statute had or had not in any given case been violated. Thus not specifying, but indubitably contemplating and requiring a standard, it follows that it was intended that the standard of reason which had been applied at the common law and in this country in dealing with subjects of the character embraced by the statute was intended to be the measure used for the purpose of determining whether, in a given case, a particular act had or had not brought about the wrong against which the statute provided."

As to section two of the act the court says:

". . . the criteria to be resorted to in any given case for the purpose of ascertaining whether violations of the section have been committed is the rule of reason guided by the established law. . . ."

The court does not say that it adopts the common law as a standard, but rather that it adopts "the standard of reason which had been applied at common law." This means that the United States Supreme Court is admitted by the Sherman Act into an area of federal jurisdiction over interstate and foreign commerce to decide what contracts, combinations, and conspiracies, and what attempts to monopolize, are illegal; that in the exercise of this jurisdiction it

is not guided by the language of the act nor bound by any adjudications of other courts; that it must therefore secure its results as any court does which is dealing with the common law when it reaches a problem upon which there is no binding decision. It must decide according to a certain technique of judicial reasoning practiced by judges sitting in courts administering the common law. With regard to contracts, combinations, and conspiracies in restraint of trade and attempts at monopoly, it must analyze the situation in question, balance the interests of the parties and the public, and reach a generalization as to what is prohibited and what is not — all for the purpose of determining whether the particular contract, combination, or conspiracy, or attempt to monopolize, in question, is legal or illegal. It must, in short, act as Lord Nottingham acted when he analyzed the limitations in the Duke of Norfolk's Case and reached a generalization which has become the basis for the modern rule against perpetuities. The Supreme Court of the United States might truthfully have said that it adopted the standard of the common law, but that since it was not bound by the decisions in other jurisdictions as to what the common law might be, it was the sole judge of that law for the purpose of applying the Sherman Act; that while it looked to the common-law decisions of other jurisdictions for aid and advice, it was its duty to approach all questions as to what the common law might be, with that exercise of reason which was the very essence of the court's function in establishing a common-law rule, before anything had been settled by actual decision.

The court explained that the Traffic Association cases only held that when an act was illegal because in restraint of trade it was useless to resort to various arguments and considerations in support of its reasonableness in order to justify it. This is the same as saying that after the interests have all been balanced and the decision is against the legality of the combination, it is useless to urge over again all those considerations which exist in favor of permitting the combination in order to upset the conclusion. If this is what the court had meant in the Traffic Association cases, it would have been easy enough to have so stated. If the court in the Traffic Association cases did not mean this — if it did mean what it certainly appeared to say, that the Sherman Act prohibited *every* contract, combination, or conspiracy which was (however slightly) in restraint

of trade, according to the literal meaning of that phrase, so that the prohibition of the act would be broader than any common-law rule of illegality — then it is overruled.

In *United States* v. *American Tobacco Co.*[51] the court, in dealing with the construction of the Sherman Act, said:

"Applying the rule of reason to the construction of the statute, it was held in the Standard Oil Case that as the words 'restraint of trade' at common law and in the law of this country at the time of the adoption of the Anti-Trust Act only embraced acts or contracts or agreements or combinations which operated to the prejudice of the public interests by unduly restricting competition or unduly obstructing the due course of trade or which, either because of their inherent nature or effect or because of the evident purpose of the acts, etc., injuriously restrained trade, that the words as used in the statute were designed to have and did have but a like significance."

This passage again clearly states that the Sherman Act only prohibits conduct in restraint of trade which is determined by the court, by the application of some standard outside the act, to be illegal. It is confusing, however, to say that this *construction* of the act is reached by the application of the "rule of reason." The phrase "rule of reason" has been used to describe the process by which the court determines what acts are illegal under the authority of the act. It would be well to retain this usage exclusively and consistently.[52]

IV

The Constitutionality and Validity of the Sherman Act

Suppose the Sherman Act prohibits every contract, combination, and conspiracy which is (however slightly) in restraint of trade according to the literal significance of those words, in accordance with the *dictum* of the court in the Trans-Missouri Freight Association Case. That would mean that some acts would be forbidden which were in restraint of trade but which at common law were legal and proper. If, however, the common law determined what acts in restraint of trade were legal or illegal on the balance of all the

[51] 221 U. S. 106, 179, 31 Sup. Ct. 632.

[52] In Eastern States Retail Lumber Dealers' Ass'n *v.* United States, 234 U. S. 600, 34 Sup. Ct. 951, the *dicta* of the Supreme Court in the Standard Oil and Tobacco cases are quoted with approval.

considerations affecting the parties and the public, the supposed interpretation of the Sherman Act would cause it to prohibit acts which on a balance of all the proper considerations were not contrary to the interests of the parties or the public. Such a construction would mean that the act would be a blow, incalculable in extent, to the freedom to do business. Would it then be due process of law under the Fifth Amendment? Might it not be quite as violent an onslaught upon the fundamentals of the social structure as the acts held void in the Lochner Case,[53] the Adair [54] and Coppage [55] cases, and the Upper Berth Case? [56] But all this is now a moot question because such a construction of the Sherman Act has been finally repudiated. It is worth noting, however, that the Supreme Court of the United States undertook to sustain the constitutionality of the Sherman Act even when it was inclined to adopt the construction assumed.[57]

Now suppose (as seems settled) the act prohibits only contracts, combinations, and conspiracies which are illegal because in restraint of trade — the illegality being determined by some standard outside the act — *i. e.*, "the standard of reason which was applied at common law," is the act valid? Certainly the act would not violate the Fifth Amendment. It would not fail to be "due process of law," for *ex hypothesi* what is declared illegal by the act should on a balance of all the interests, be prohibited.[58] But why is not the act void for uncertainty, or because it is the delegation of legislative power to the court to define crime and acts which are prohibited by law?

If the statute is not void for uncertainty it must be because there

---

[53] Lochner *v.* New York, 198 U. S. 45, 25 Sup. Ct. 539.

[54] Adair *v.* United States, 208 U. S. 161, 18 Sup. Ct. 277.

[55] Coppage *v.* State of Kansas, 236 U. S. 1, 35 Sup. Ct. 240.

[56] Chicago, Milwaukee & St. P. R. R. *v.* Wisconsin, 238 U. S. 491. See "Due Process the Inarticulate Major Premise and the Adamson Act," by A. M. Kales, 26 YALE LAW JOURNAL, 519.

[57] United States *v.* Joint Traffic Association, 171 U. S. 505, 19 Sup. Ct. 25.

[58] Standard Oil Company *v.* United States, 221 U. S. 1, 31 Sup. Ct. 502. ("But the ultimate foundation of all these arguments [against the constitutionality of the Sherman Act] is the assumption that reason may not be resorted to in interpreting and applying the statute, and therefore, that the statute unreasonably restricts the right to contract, and unreasonably operates upon the right to acquire and hold property. As the premise is demonstrated to be unsound by the construction we have given the statute, of course the propositions which rest upon that premise need not be further noticed.")

is a sufficient standard to make the acts prohibited certain. In *International Harvester Co.* v. *Kentucky* [59] the legislation in question failed for uncertainty because there was no standard at all. The standard of real value of the article sold by the combination as compared with the price asked was purely illusory. In the case of the Sherman Act, however, there is a standard in the fiat of the court itself applying the rule of reason as at common law. This is a real standard because it makes every act prohibited just as definite and certain as was every common-law crime, or act held invalid because it was in restraint of trade, before the court had finally adjudicated the act to be a crime or to be illegal. Courts which are admittedly tied to the common-law system could not say that a statute which, in defining crime or illegal acts provided for the same degree of uncertainty — no more and no less — and the same basis of uncertainty which existed at common law before any authoritative determination had been made, was too uncertain to be valid.[60]

But if the source of uncertainty is the "standard of reason" applied by the court, why is not the act void because it is a delegation of power to define crime and illegal acts? Suppose, for instance, the act had in terms empowered the Supreme Court to determine what contracts, combinations, and conspiracies in restraint of trade were illegal and that in so doing it was to exercise its reason, and balance the interests of the parties and the public as the judges in common-law courts did upon making a decision before any authoritative adjudication had occurred upon the subject dealt with. Would such an act be a delegation of legislative power to define crime or illegal acts? Clearly not. The legislation enacted would merely cast upon the court its centuries-old common-law judicial function. The act would do no more than define a federal jurisdiction over interstate and foreign commerce into which it would conduct the court there to operate as common-law courts regularly operate in reaching decisions. It would do no more than is effected where, by the settlement of a colony or a territory from a common-law jurisdiction, the courts of the new jurisdiction begin to decide what is common law and to apply it on the ground that the settlers brought the common law with them.[61] The Supreme Court of the United

[59] 234 U. S. 216, 34 Sup. Ct. 853.

[60] Nash *v.* United States, 229 U. S. 373, 33 Sup. Ct. 780.

[61] Railroad *v.* Keary, 3 Ohio State, 201, 205; Bloom *v.* Richards, 2 Ohio State, 387,

States, when exercising its original jurisdiction in disputes between states, at once adopted the standard of reason which was applied at common law, and called the result interstate common law.[62] Surely Congress can give to the federal courts the power which courts have exercised without any act of any legislature. The federal courts in certain classes of cases where they obtained jurisdiction on the ground of diverse citizenship have, under the doctrine of *Swift* v. *Tyson*,[63] undertaken to apply what they conceive is the common-law rule. Their common-law rule not infrequently differs from the common-law rules of the state where the action arose and where the case is tried. No acts of Congress conferred this power.[64] By what rational process the federal courts secured it is still a mystery.[65] Surely what the federal courts can do in the way of declaring to be the common law in the exercise of their jurisdictions founded on diverse citizenship, Congress can confer upon the federal courts power to do in the jurisdiction which the federal constitution confers with respect to interstate and foreign commerce. Then we have the state statutes which declare generally that the common law shall be the rule of decision. We find cases attempting to describe what this means.[66] But no one ever attempted to call such acts unconstitutional because they were a delegation of legislative power to the courts to define crime, or the rights or liabilities of the parties. The parallel between such acts and the Sherman Act is complete. Both alike conduct the courts into a given jurisdiction and then authorize them to act within that jurisdiction the way courts administering the common law have been accustomed always to act. The only

---

390. See also State *v.* Cawood, 2 Stew. (Ala.) 360, 362. In Lyle *v.* Richards, 9 Serg. & Rawle, 322, 330, the court states that our ancestors "brought with them the common law in general, although many of its principles lay dormant, until awakened by occasion."

[62] Kansas *v.* Colorado, 206 U. S. 46, 27 Sup. Ct. 655.

[63] 16 Pet. 1.

[64] Indeed, it seems to have been established contrary to the terms of the Judiciary Act, U. S. Stat. 1789, ch. 20, par. 34, which provided that "the laws of the several states, except where the Constitution, pleadings, or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States in cases where they apply"; and under which it has been held that the rules of law determined by the decisions of the state as to the law of real property, for instance, shall be applied in the federal courts.

[65] JOHN C. GRAY, THE NATURE AND SOURCES OF THE LAW, §§ 535 *et seq.*

[66] Williams *v.* Miles, 68 Neb. 463, 94 N. W. 705, 97 N. W. 246; Lux *v.* Haggin, 69 Cal. 255, 4 P. 919, 10 P. 674; Sayward *v.* Carlson, 1 Wash. 29, 23 P. 830.

difference is that the general statute adopting the common law is comprehensive as to subjects and territorial jurisdiction. The Sherman Act picks out a special jurisdiction — "interstate and foreign commerce" — and then as to that gives the federal courts authority to act (as common-law courts administering common law have been accustomed to act) only with reference to contracts, combinations, and conspiracies in restraint of trade, and monopolies, and attempts to monopolize.

V

Patents and Copyrights

A patentee is given by law the exclusive right, for a limited period to "make, use, and vend" the invention, or license others to do so.[67] The holder of a copyright is given the "sole right and liberty of printing, reprinting, publishing, and vending" the copyrighted article for a term of years.[68]

These grants of privileges by Congress are, however, subject to the legislative power of the state to some extent — at least in the absence of any more explicit action by Congress. Thus the right given by letters patent to vend a patented improvement for burning oil was subject to the legislative power of a state which condemned the device as dangerous.[69] So the existence of the Bell Telephone and subsequent telephone patents which the Central Union Telephone Company was entitled to use in Indiana, did not avoid an act of the Indiana legislature providing for the regulation of rates to be charged by telephone companies.[70]

An important question which has arisen under the Patent and Copyright Acts is this: How far may the sale or the license to use the patented article, or the sale of a copyrighted article, be made subject to conditions or stipulations which, if not adhered to, will avoid the license or the sale and cause the continued use to be an infringement?

When, for instance, the patentee of the fundamental Bell telephone patent, which gave to the patentee a monopoly of the telephone business down to 1893, leased telephone instruments to

[67] Rev. Stats., § 4884.

[68] 1 Stat. at L., by Peters, ch. 15, page 124. See also R. S. 4952, Act March 4, 1909, ch. 320, § 1.

[69] Patterson *v.* Kentucky, 97 U. S. 501, affirming, 11 Bush, 311, 21 Am. Rep. 220.

[70] Hockett *v.* State, 105 Ind. 250, 257, 5 N. E. 178.

telephone companies, it attempted to impose the restriction that the instrument should not be used by telegraph companies other than the Western Union. When telegraph companies other than the Western Union attempted to compel the Bell Telephone Company to render service, they were met with the defense that this was forbidden by the stipulation and conditions of the license and lease in question. This defense failed.[71] When the instruments were put into use by lease or license in a given public service business, the conduct of the business was required to be in compliance with the rules of law relating to that business — one of which was that all members of the public were entitled to be served without discrimination. The license to use the invention could not be so restricted as to interfere with this rule.

More recently attempts have been made to sell or license the use of a patented article with a stipulation that the vendee or licensee, and those who take from them, shall use, with the patented article, only certain unpatented accessories sold by the vendor or licensor.[72] Licenses have provided, both as to patented articles and copyrighted articles, that they shall not be resold by the vendee or licensee or anyone taking from them for less than a certain price.[73] In suits based upon the Patent and Copyright Acts to enjoin the use of the patented or copyrighted article where these stipulations have been violated by remote holders with notice, the United States Supreme Court has decided against both the patentee and the holder of the copyright.[74] These cases proceed primarily upon

[71] State *v.* Bell Telephone Co., 36 Ohio State, 296; Commercial Union Telegraph Co. *v.* New England Telephone & Telegraph Co., 61 Vt. 241, 17 Atl. 1071; State of Missouri *v.* The Bell Telephone Company, 23 Fed. 539; State *ex rel.* Postal Telegraph Cable Co. *v.* Delaware & Atlantic Tel. & Tel. Co., 47 Fed. 633; Delaware & Atlantic Tel. & Tel. Co. *v.* Delaware, 50 Fed. 677; Bell Telephone Company *v.* Commonwealth, 3 Atl. 825, 827 (Pa.) (1886); Chesapeake & Potomac Telegraph Co. *v.* Baltimore & Ohio Telegraph Co., 66 Md. 399, 416, 7 Atl. 809; State *v.* Nebraska Telephone Co., 17 Neb. 126, 22 N. W. 237, 239; Postal Cable Telegraph Co. *v.* Cumberland Telephone & Telegraph Co., 177 Fed. 726; Bement & Son *v.* National Harrow Co., 186 U. S. 70, 22 Sup. Ct. 747 (*semble*); Heaton-Peninsular Button-Fastener Co. *v.* Eureka Specialty Co., 77 Fed. 288 (*semble*); Metropolitan Trust Co. *v.* Columbus Co., 95 Fed. 18 (*semble*).

[72] Henry *v.* A. B. Dick Co., 224 U. S. 1, 32 Sup. Ct. 364; Motion Picture Patents Co. *v.* Universal Film Manufacturing Co., 243 U. S. 502, 73 Sup. Ct. 416.

[73] Bobbs-Merrill Co. *v.* Straus, 210 U. S. 339, 28 Sup. Ct. 722; Bauer *v.* O'Donnell, 229 U. S. 1, 33 Sup. Ct. 616; Strauss *v.* Victor Talking Machine Co., 243 U. S. 490, 37 Sup. Ct. 412.

[74] See cases cited *supra*, notes 73, 74, except Henry *v.* A. B. Dick Co., 224 U. S. 1, 32

a construction of the Patent and Copyright Acts — namely, that the right to "vend" or "license" does not include the right to place upon the use by the licensee or vendee or others the conditions or restrictions in question. Underlying this, however, is the idea that there is something contrary to public policy in such conditions and stipulations; that they are, apart from any question of patents or copyrights, subject to condemnation because they are illegal restraints of trade or attempts at monopoly, and that the right to "vend" and "license" under the Patent Act and the right to "vend" under the Copyright Act must be subject to the further rule that no stipulations or conditions shall be attached to the sale or license of the patented article which would be illegal if attached to a non-patented or non-copyrighted article. An effort has been made elsewhere to show that there is, upon a proper balancing of all the interests, no ground for holding the stipulations or conditions in question void when attached to an unpatented or copyrighted article.[75]

How far does a patent which controls the carrying on of a given business during the life of the patent justify a combination of units in that business which, except for the patent, would be illegal? [76]

It is safe to say that a patent will not justify a combination which is arranged to extend beyond the life of the patent.[77] It seems quite as clear that if the control of the business is secured by the union or purchase of competing patents it will not only not be justified but an additional ground for illegality will exist.[78] Since each patent gives the patentee a monopoly for seventeen years of the

Sup. Ct. 364, which sustained the suit of the patentee, but must now be regarded as overruled.

[75] A. M. Kales, "Contracts to Keep up the Price on Resale and to Buy or Use Other Articles in Connection with those Sold," CORNELL L. QUART., January, 1918.

[76] Bement *v.* National Harrow Co., 186 U. S. 70, 22 Sup. Ct. 747, [1246] is often cited in this connection, but it does not in the least touch the problem because only a single contract was involved. The record did not disclose any combination for the court to pass upon, and the single contract before the court was unobjectionable even if there had been no patent.

[77] Strait *v.* National Harrow Co., 18 N. Y. S. 224.

[78] Blount Mfg. Co. *v.* Yale & Towne Mfg. Co., 166 Fed. 555; National Harrow Co. *v.* Hench, 83 Fed. 36; National Harrow Co. *v.* Hench, 84 Fed. 226; United States *v.* New Departure Mfg. Co., 204 Fed. 107; Vulcan Powder Co. *v.* Hercules Powder Co., 96 Cal. 510, 31 P. 581; State *v.* Creamery Package Mfg. Co., 110 Minn. 415, 126 N. W. 126, 623.

use and disposal of his invention the field is absolutely closed to all others. It follows that the union of the only two properties which can be used to carry on a given business would make an actual monopoly. A union of two out of three, or even a union of any number out of any other number, would produce an illegal attempt at monopoly. The right to vend or license the use of an invention is subject to the general rules of law against monopoly to this extent, at least, that after property in an invention has been created and an exclusive privilege of vending or licensing given, it must, like other property, be kept out of combinations with other properties which constitute an attempt at monopoly in the conduct of the business.

If the patents or copyrights cannot be said to be of so fundamental a character as to exclude others from the business, they can hardly be used to justify a combination of competing units which has a preponderant position and an intent to monopolize by excluding others by unfair and illegal methods of competition.[79]

Suppose a single fundamental patent gave to the patentee a monopoly of doing a given business for seventeen years. Would that fact justify the combination, limited to the life of the fundamental patent, of units in the business which would otherwise be illegal solely because it was an attempt to monopolize?

In *Standard Sanitary Manufacturing Co.* v. *United States*[80] it appeared that the business of manufacturing enamel iron ware had been carried on by many competitors when the Arnott patent was issued which provided for so superior a process that it controlled the business. Competitors attempted to compete, but the effectiveness of the patent was such that the great majority were forced into a combination which was effected by license contracts to use the patents. These license contracts provided among other things for the elimination of all competition between the units combined so far as the fixing of prices was concerned. The United States Supreme Court held that the combination was without justification. The Patent Act which gave an exclusive right to vend or

[79] Straus *v.* American Publishers Association, 231 U. S. 222, 34 Sup. Ct. 84. Where, however, the patents are not competing but are supplementary to each other — all being used together for the purpose of manufacturing a given commodity — there is no objection to the assembling in a single manufacturing unit many valuable patents. United States *v.* Winslow, 227 U. S. 202, 33 Sup. Ct. 253.

[80] 226 U. S. 20, 33 Sup. Ct. 9.

license the article patented did not give any special privilege to use that right for the ulterior purpose of forcing competitors into a combination which except for the patent would be illegal.

Suppose there had been no one at all in the business when the invention was made — as in the case of the telephone. Suppose the holders of a single fundamental telephone patent, which gave a monopoly of the telephone business, should organize that business for the period of the life of the patent as a combination of operating units, each a separate and distinct corporation, with separate and distinct bodies of stockholders with all competition between them eliminated under the terms of the license contract to use the patent. Would such a combination have been legal? Could a distinction be made between the using of a fundamental patent to suppress a competition which existed before the patent, and to force those units which had previously competed into a combination, and the using of a fundamental patent to create a business which had not before existed but which was organized on the basis of combining separate units which were not permitted to compete?

VI

Who may Invoke the Application of the Sherman Act?

Of course the Attorney-General of the United States may invoke the application of the act by a bill in equity or indictment in the federal courts. The individual may also do so in a suit for triple damages under section 7. But the stockholder of a corporation that could sue under section 7 cannot, in his own name, sue for triple damages,[81] nor can he sue in equity for triple damages even when the officers of the corporation refuse to do so and the corporation itself is made a party defendant.[82] Such an action would deprive the defendant who had wronged the corporation of trial by jury in a suit for a penalty. His right should not be affected by the refusal of the officers of the corporation to accommodate the stockholder. The stockholder might attempt to secure a decree directing the corporation to sue, and if it failed to do so, or could not properly be trusted to do so, ordering the corporation to permit the plaintiff to sue at law in its name and on its behalf. Perhaps

[81] Ames *v.* American Tel. & Tel. Co., 166 Fed. 820.

[82] Fleitmann *v.* Welsbach Co., 240 U. S. 27, 36 Sup. Ct. 233.

in the suit by the stockholder against the corporation and the defendant alleged to have committed the damage, the court, after a preliminary investigation of the merits of the plaintiff's case and the existence of the refusal of the corporate officers to sue, and want of justification for such refusal, might properly send the issue of the violation of the Sherman Act and the damages to a court of law for trial by jury.

How far may the individual (apart from the suit for triple damages) invoke the operation of the court under the Sherman Act? Of course, he cannot take the place of the Attorney-General and institute such a suit as the government is authorized to bring.[83] The individual must in any case have a private right which is infringed by the conduct which under the Sherman Act is illegal. This usually means that he must have suffered some special damage — damage different from that suffered by the public at large.

Suppose, for instance, the complainant is a minority stockholder in a corporation, the majority of the stock of which is illegally and in violation of the Sherman Act being held by another corporation. Can there be any doubt that the minority stockholder can challenge the legality of that stockholding? Hardly. It is no answer that the government can do so, or that the stockholder might sue for triple damages. The Sherman Act makes the stockholding generally illegal, and the lawful stockholder may challenge in equity the control and acts of the illegal holder of stock,[84] just as he may where the stockholding is illegal at common law.[85] His private right to be associated only with legal stockholders has been infringed, he has suffered the special damage required.

Suppose the defendant's conduct in violation of the Sherman Act is a tort to the plaintiff for which he could recover triple damages. For instance, suppose as in *Loewe* v. *Lawlor* [86] the defendant has practiced the secondary boycott against the plaintiff and thereby

[83] Minnesota *v.* Northern Securities Co., 194 U. S. 48, 70, 72, 24 Sup. Ct. 598.

[84] Bigelow *v.* Calumet & Hecla Mining Co., 155 Fed. 869 (1907); Shawnee Compress Co. *v.* Anderson, 209 U. S. 423, 28 Sup. Ct. 572; Continental Securities Co. *v.* Interborough Rapid Transit Co., 165 Fed. 945; De Koven *v.* Lake Shore & M. S. R. R. Co., 216 Fed. 955; Geddes *v.* Anaconda Copper Mining Co., 222 Fed. 129; Boyd *v.* New York, & H. R. R. Co., 220 Fed. 174; Union Pacific R. R. Co. *v.* Frank, 226 Fed. 906.

[85] Dunbar *v.* American Telephone & Telegraph Co., 238 Ill. 456, 87 N. E. 521; Harding *v.* American Glucose Co., 182 Ill. 551, 625–633, 55 N. E. 577.

[86] 208 U. S. 274, 28 Sup. Ct. 301; Lawlor *v.* Loewe, 235 U. S. 522,35 Sup. Ct. 170.

damaged him. Suppose also the damage is irreparable and the remedy at law — even for triple damages — is inadequate, can the plaintiffs have relief by injunction? This question should be answered in the affirmative. No reason can be urged why the injunctive remedy is not available to prevent a tort merely because the tort is the creation of a statute, unless it can be said that the statutory remedies are exclusive. The cases which give the minority stockholder a right to proceed in his own name against the illegal stockholders indicate that the remedies provided by the statute are not exclusive. Furthermore, when it is remembered that the true function of the Sherman Act is not to make illegal any specifically described act, but merely to let the federal courts into a federal jurisdiction over interstate and foreign commerce, there to exercise the common-law court's function of deciding what contracts, combinations, and conspiracies in restraint of trade are illegal, and what monopolies and attempts to monopolize are illegal, there is reason enough for permitting all the remedial consequences of the court's action in finding certain acts to be illegal. The remedies provided by the statute are just those which the courts exercising the functions of the common-law courts could not grant. They are, therefore, in addition to the remedies which the court could grant if those special remedies had not been mentioned in the act. Hence, when under the authority of the statute the court finds that a tort has been committed, any remedy by injunction ordinarily available should be open to the plaintiff — possibly with the qualification that, if triple damages may be recovered, the complainant's bill for an injunction should make it clear that a judgment for triple damages is still an inadequate remedy at law. Recently, however, the Supreme Court, in *Paine Lumber Co.* v. *Neal*,[87] has taken a contrary view.[88] The majority of the court, by Mr. Justice Holmes, merely expresses its conclusion. Four justices dissented. The dissenting opinion of Mr. Justice Pitney seems not to have been met or to be answerable. In view of section 16 of the Clayton Act the precise question involved is now of less practical interest.

Suppose the defendant, when sued upon a contract for the sale

[87] 244 U. S. 459, 37 Sup. Ct. 718.

[88] Following the inclination of the lower federal courts in Pidcock *v.* Harrington, 64 Fed. 821, [1219]; Blindell *v.* Hagan, 54 Fed. 40; Greer Mills & Co. *v.* Stoller, 77 Fed. 1; Southern Indiana Express Co. *v.* United States Express Co., 88 Fed. 659; National Fireproofing Co. *v.* Mason Builders Association, 169 Fed. 259.

of goods, defends upon the ground that the seller exists in violation of the Sherman Act. Clearly the defense fails. The mere existence of the seller is not a special damage to the defendant or an infringement of any private right which he may have. The buyer is affected only in the same way that the public generally is affected. He cannot, therefore, raise the illegality of the seller's existence as a business unit.[89] Suppose, however, the very contract of sale upon which the defendant is sued for the purchase price is itself illegal, because one of a scheme of contracts by means of which the illegal combination is secured, the Wall Paper Case, these facts were held to constitute a defense.[90] In the Corn Products Case [91] the decision in the Wall Paper Case was approved and distinguished on the ground that the holding there "was rested exclusively upon elements of illegality in hearing in the particular contract of sale in that case." In the Corn Products Case the contract sued upon was, taken by itself, legal. It did not appear that the scheme of contracts of which it was a part effected the illegal combination, but only that the seller which made the contract was an illegal combination and sought to perpetuate its power by the form of contract in question. This was insufficient and distinguished the case from the Wall Paper Case.

Albert M. Kales.

CHICAGO, ILLINOIS.

---

[89] Connolly *v.* Union Sewer Pipe Co., 184 U. S. 540, 22 Sup. Ct. 431.

[90] Continental Wall Paper Co. *v.* Voight & Son Co., 212 U. S. 227, 29 Sup. Ct. 280. In the same way where a long-distance telephone company attempted to enforce specifically an exclusive contract for connection with local exchanges, and the exclusive contract was part of a scheme of contracts and all were illegal at common law and under the Sherman Act, these facts constituted a complete defense. United States Telephone Co. *v.* Central Union Telephone Co., 202 Fed. 66.

[91] Wilder Manufacturing Co. *v.* Corn Products Co., 236 U. S. 165, 35 Sup. Ct. 398.